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No. 83-283

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

Kahala Community Association, Inc.
and Kahala Community Fee Purchase Fund,

Appellants,

vs.

Frank E. Midkiff, Richard Lyman, Jr.,
Hung Wo Ching, Matsuo Takabuki
and Myron B. Thompson, Trustees of
the Kamehameha Schools/Bishop Estate,

Appellees.

On Appeal From the United States
Court of Appeals for the Ninth Circuit

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

SUMMARY OF ARGUMENT

The Kahala Community Assn., Inc., et al. ("Kahala"),[1] Appellants in No. 83-283, adopt

[1]Counsel of Record for Appellants Kahala Community Association, Inc. and Kahala Community Fee Purchase Fund also represent the following

the Reply Brief of the Hawaii Housing Authority, et al., Appellants in No. 83-141. Kahala's sole purpose in this brief is to reply specifically to the arguments of Amici Curiae The Office of Hawaiian Affairs ("OHA") and Queen Liliuokalani Trust, et al. ("QLT") (collectively "Amici") set forth in their briefs in support of Appellees Frank E. Midkiff, et al. in Nos. 83-141, 83-236 and 83-283.

Amici, purporting to speak for the Native Hawaiian population of Hawaii, cast the Hawaii Land Reform Act ("Act")[2] not as the informed, compromise legislative solution to a multi-faceted social problem which it

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[1] (cont'd) community associations in matters relating to the Hawaii Land Reform Act: Lunalilo Park, Kaonohi Ridge, Waialae Nui Valley, Waialae Nui Ridge, Ainakoa, Haiku Park, Crown Haiku, Waialae Iki, and Enchanted Lakes.

[2] Hawaii Rev. Stat. ch. 516 (Appendix to Jurisdictional Statement in No. 83-141, pp. 109-140).

is, but as no more than an act of legislative tunnel vision directed specifically against Native Hawaiians. Not only are Amici's claims to the legitimate representation of Native Hawaiians belied by, inter alia, the brief of Amicus Curiae The Hou Hawaiians, et al. ("The Hou Hawaiians") in No. 83-141, but the very bases for Amici's distorted view of that legislative process are factually unsupportable.

Even were those premises correct, the conclusion which Amici urge--that the Act should fail because it might have a negative impact on some Native Hawaiians--is not relevant to the questions before this Court. The proper forum for the debate into which Amici entice this Court was, is and should continue to be that legislative process.

ARGUMENT

A. Amici's Argument that the Hawaii Land Reform Act Should Be Struck Down Because of Its Possible Negative Effect on Some Native Hawaiians is Based On Wholly Erroneous Assumptions.

In essence, Amici ask this Court to view the Act and its legislative evolution as an uninformed endeavor intended only to harm Native Hawaiians. The progression of their argument to this incorrect conclusion is based upon the following assertions: (1) that the same historical developments which resulted in the extreme centralization of land ownership in Hawaii also dispossessed Native Hawaiians from their lands; (2) that their dispossession has resulted in problems for Native Hawaiians to which government is unresponsive; (3) that the Act was directed solely at the further divestiture of what are

the last "Native Hawaiian" landholdings, those of Appellees Frank E. Midkiff, et al. ("Trustees"); (4) that Trustees and others representing the interests of both large landowners and Native Hawaiians were precluded from effective participation in the long political process that led to passage of the Act; and (5) that implementation of the Act will cripple Trustees' ability to provide financial support to the Kamehameha Schools which educate some Native Hawaiians.

The historical evolution of land ownership in Hawaii is not in dispute; its end result is the very reason for the Act. Similarly, there is no dispute that Trustees are the trustees of a trust estate ("Bishop Estate") which is the largest private landowner in the State and that they devote the net income of the Bishop Estate to the support

of the Kamehameha Schools.[3] But any factual support for Amici's premises ends here.

1. Trustees are not the sole providers of benefits to Native Hawaiians, nor may Trustees return their vast landholdings to Native Hawaiians.

Again, there is no disputing either Trustees' status as the largest private landowner in the State with approximately 341,500 acres[4] or Trustees' use of trust

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[3]The will which created the Bishop Estate provided that the Estate shall be devoted to the establishment and support of a school "for the children of Hawaii." The Trustees and their predecessors have interpreted this to mean children who have some degree of Hawaiian blood. This limiting interpretation has not been challenged to date.

[4]Hawaii Housing Authority v. Midkiff, et al., Civil No. 83408 (Haw. Cir. Ct., Sept. 6, 1983) ("Kamiloiki Valley Case"), Finding of Fact ("FoF") 129, reprinted in Appendix to Brief on the Merits of Portlock Community Assn., et al., Appellants in No. 83-236 ("Portlock Appendix"), at p. A-88. The

income to support schools which serve Native Hawaiians.[5]

But the Bishop Estate cannot be portrayed as the only remaining significant "Native Hawaiian" landholding of benefit to Native Hawaiians. For not only are the Trustees' landholdings not available for direct distribution to Native Hawaiians under the provisions of the will, but other major sources of land exist for the direct benefit of that segment of the Hawaiian population.

The Hawaiian Home Lands, for example, are some 200,000 acres set aside by the United States Congress in the Hawaiian Homes Commission Act of 1920[6] for the immediate

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[4] (con'd) Bishop Estate has been estimated to have a total value of some $2-3 billion dollars. See Portlock Appendix, FoF 134, p. A-89.

[5] See Portlock Appendix, p. A-25.

[6] 42 Stat. 108 (1921).

use of and eventual direct distribution to Native Hawaiians.[7] And potentially even more beneficial to Native Hawaiians are the so-called "ceded lands" created in the Hawaii Admission Act.[8] Specifically, Section 5 of

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[7]The Act and its workings are fully described in the Brief of Amicus Curiae The Hou Hawaiians ("Hou Brief") filed in No. 83-141, at pp. 22-31.

The Hou Hawaiians states in that brief that it "advocates and represents the interests of the approximately 8,000 Native Hawaiian applicants for Hawaiian homestead lands . . . ." (Hou Brief, p. 1.) While it purports to "take no position respecting affirmance or reversal of the decision below," id. at p. 2, it later states that:

> Native Hawaiians believe that this Court's recognition of the desirability of distribution of land held in the iron grip of large holders, and of the principle that the social utility of such distribution confirms the constitutionality of legislation providing for it, will provide impetus to more rapid distribution to Native Hawaiians of homesteads under the Hawaiian Homes Commission Act.

Id. at p. 36.

[8]Pub.L.No. 86-3, 73 Stat. 4 (1959).

that Act provides in essence that the United States shall grant to the State of Hawaii all lands it owned immediately prior to the State's admission into the Union, except for such of its lands as it shall reserve unto itself. The section further states that any such lands granted together with the proceeds from their sale or other disposition and the income therefrom "shall be held by said State as a public trust for . . . [inter alia] the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended. . . ."

Moreover, if, as Amici urge, the problems of Native Hawaiians today arise largely from dispossession from their lands, they cannot be remedied by Trustees. The will under which Trustees operate does not permit direct distribution of the trust lands to Native Hawaiians. Rather, Trustees' policy has been to lease residential lands for income without

any restrictions on lessees' ethnic background.[9] The direct benefits that Bishop Estate can provide to Native Hawaiians is limited to the educational opportunities available to some through the Kamehameha Schools.

Under these circumstances, the best hope for a return of land to Native Hawaiians would appear to lie in the distribution of the Hawaiian Home Lands or in the Act itself. Its very objective, after all, is to broaden the availability of fee simple residential land ownership, regardless of the aspiring landowner's ethnic background. This basic fact is recognized by at least one Native Hawaiian group which supports the Act:

> If, as seems likely, the State sells the land condemned under the statute at Hawaii's presently inflated land prices, few Native

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[9] See generally Kamiloiki Valley Case, FoF 136-165 (Portlock Appendix, pp. A-89-A-97).

> Hawaiians will be in a position to purchase. Nevertheless, the Native Hawaiians hope that the condemnation and distribution of properties under the Act will relieve the pressure on land prices from more affluent non-Native Hawaiians who bid prices up because of the shortage of residential land for sale.[18]

Finally, Amici's emphasis on Bishop Estate's importance to the Native Hawaiian community implies that Native Hawaiians have only the Estate to look to for support and that government has been wholly unresponsive to the particular needs of that segment of the community. One has only to skim Amici's table of authorities, which cite numerous governmental reports and enactments regarding Native Hawaiians, to see the fallacy of this presumption. And the responsiveness of the Act itself to the fee ownership desires of

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[18]Hou Brief, p. 35.

Hawaii's people including Native Hawaiians cannot be overlooked.[11]

2. The Act makes no distinction among lessors according to their use of lease revenues and is equally indifferent in application to the economic status of lessees.

The emphasis by Amici on the benefits of the Kamehameha Schools to Native Hawaiians

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[11]Amicus OHA, while disputing that Native Hawaiians are among the beneficiaries of the Act, suggests that the exercise of the power of eminent domain as set forth in the Act would be for a public purpose and thus constitutional "[i]f the roles [of Bishop Estate/ Native Hawaiians as lessors and of presumably largely non-native Hawaiians as lessees] were somehow reversed." OHA Brief, p. 29. Whether the legislature should exercise its condemnation power to redistribute land to Native Hawaiians is for the political process to decide. But Amici may not argue with any consistency that the State's condemnation power could be constitutionally used to redistribute lands to native Hawaiians yet be constitutionally infirm when addressed to problems caused by the residential leasehold system of the large landowners.

implies that the Act was intended to affect Bishop Estate not because it is a residential lessor but because it is a provider for the Native Hawaiians. But a review of the Act and of those landowners potentially or actually affected by it demonstrates that this is false.

First of all, the Act itself contains no provisions which distinguish landowners by any yardstick other than the quantity and contiguity of land ownership. It applies equally to landowners that engage in the practice of long-term residential leasing and is utterly unconcerned with where their lease rent or condemnation proceeds go.

Nor is there any such distinction in its potential application. For example, of the six largest private landowners on Oahu in 1964, only one, the Bishop Estate, was devoted to benefitting Native Hawaiians;[12]

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[12]See Kamiloiki Valley Case, FoF 70 (Portlock Appendix, p. A-66)

the other five were either corporations for profit or private beneficiary estates. And in actual application, the Act has been utilized to pursue the condemnation of the residential leaseholds of a variety of landowners.[13]

Just as the Act makes no distinctions among residential lessors according to the use to which they put their land and proceeds, so is there no provision in the Act which supports Amici's assertion that "[o]nly the rich, not the poor, will be served by this statute."[14] And not only does that

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[13] See, e.g.: HHA v. Richard Q. Y. Wong, et al., Civil No. 60220 (Haw. Cir. Ct. Jan. 9, 1980); HHA v. Violet Gaspar, et al., Civil No. 61322 (Haw. Cir. Ct. April 30, 1980); HHA v. Kalama Land Co., Ltd., Civil No. 61382 (Haw. Cir. Ct. May 7, 1980); and HHA v. James C. Castle, et al., Civil No. 62181 (Haw. Cir. Ct. July 18, 1980).

[14] QLT Brief, pp. 17-18. See also OHA Brief, p. 29, and Trustees' Brief, p. 68 n. 169.

statement demonstrate an unfamiliarity with the Act's workings, but it illustrates Amici's and Appellees' total misperception of the Act's purpose.

Amici and Appellees arrive at this conclusion by first stating that "[t]he majority of the Trust's lots impacted by this statute are in eastern suburban Honolulu[,]" and then utilizing 1980 Census records to characterize the residents of that general area as high-income.[15] No doubt some areas of "eastern suburban Honolulu" are among the most desirable residential lands in the City. But the following statements are also true: (1) "eastern suburban Honolulu" also includes lower middle class residential areas and is certainly not the paradise Amici would have it; (2) a great number of Bishop Estate's lots subject to condemnation under the Act

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[15]QLT Brief, p. 17.

are located in other, much poorer areas of the State;[16] (3) the act is not restricted in its applicaton to any particular lessor, and there are a great number of residential lessors who lease lots subject to condemnation under the Act in other, much poorer areas of the State; and (4) most importantly, the Act itself makes no distinctions in lessee eligibility according to income level. In summary, the lessees affected by the residential leasehold system and the Act are largely Hawaii's middle class which consists of people from all ethnic backgrounds including Native Hawaiians.

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[16]As one illustration, using Amici's methodology, the residential leaseholds at issue in the condemnation action of Hawaii Housing Authority v. Midkiff, Civil No. 64990 (Haw. Cir. Ct. March 27, 1981) are owned by Bishop Estate and located in western suburban Honolulu. They are included in census tract 78.02, the median household income in which tract, according to the 1980 Census, was only $23,332. U.S. Department of Commerce, Bureau of the Census, Census of Population and Housing, 1980 Table P-11, PHC 80-2-183.

In any event, there is a fatal flaw in Amici's logic. If the American dream of owning one's own home is alive in Hawaii as the legislature perceived it was, existing homeowner/lessees will by definition be largely the middle class. It was one of the legislature's precise objectives in passing the Act to make available the benefits of home and residential land ownership to a broader spectrum of society. To view the Act as no more than a private bill for the richest non-landowning citizens of Hawaii is to demonstrate the same tunnel vision Amici suggest the legislature applied in enacting the measure.

3. Trustees and others with vested interests in the Act's evolution enjoyed full participation in the legislative process.

In alleging the Act's negative effect on Native Hawaiians, Amici imply that the views of Trustees, other large landowners and Native Hawaiians were not considered by the legislatures which enacted and amended the Act. This assumption is totally and completely wrong.

First, common sense dictates that an entity which is both the largest private landowner in the State and a provider of educational services to Native Hawaiians would have fully participated in the lengthy political process that led to the passage of the Act and subsequent amendments. And this becomes even more obvious when Bishop Estate's uniquely powerful role in Hawaiian politics is fully appreciated.[17]

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[17]"A legislator once called it 'Hawaii's other government.' Its the giant landowners, the Bishop Estate, and the jobs held by its

Nor does any discrepancy exist between what common sense and Trustees' position in Hawaiian politics indicate and what Trustees' actual role has been in the effort to solve Hawaii's residential leasehold problem. The legislative history of that effort for the period 1955 through 1975, for example, during which the legislature "drafted and passed successive pieces of legislation to investigate, determine possible solutions and to

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[17] (cont'd) five voting trustees are among the most desired and challenging in Hawaii." Bishop Estate: A Job at the Top, Honolulu Advertiser, April 25, 1982, at A-3, col. 1. "In Hawaii, only the government has more power and influence than the five-member board of trustees of the Bishop Estate." Tangled in Hawaiian Politics, Wealthy Estate Gains Strength, Raleigh, N.C. News & Observer, July 17, 1983, at A-18, col. 1. See also QLT Brief, at pp. 5-6 ("[Bishop Estate trustees are] appointed by a majority of the Justices of the Hawaii Supreme Court, who have exercised their discretion with care, selecting persons who were established leaders in the community." (emphasis added))

rectify these problems concerning residential leasehold land tenure, the concentration of landownership, the resulting inflation in land prices, the desire for people to own their houselots in fee simple, and the effect on the public's health and welfare[,]"[18] is chocked with communications, testimony and other legislative interaction involving Bishop Estate, other residential lessors and Native Hawaiian groups.[19]

And this participation was far from futile. In fact, legislative and executive

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[18]Kamiloiki Valley Case, FoF 16 (Portlock Appendix, p. A-27)

[19]See generally Kamiloiki Valley Case, FoF 15-56 (Portlock Appendix, pp. A-26 - A-60). In particular, see id.: FoF 17, p. A027 (1955 request to estates and other landowners to provide written statements to Legislative Reference Bureau regarding plans to comply with sense of Territorial Senate that fee simple landholdings be diversified); FoF 18 at p. A-31 (1959 committee report discussing Bishop Estate testimony on lease vs. fee sales); FoF 21, p. A-34 (Bishop Estate and

consideration of the Trustees' views and the perceived interests of the Bishop Estate's beneficiaries may have been the single most important factor in delaying and complicating

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[19] (cont'd) Campbell Estate 1959 testimony); FoF 22, p. A-35 (1959 landowner response to Senate questionnaire on land policies); FoF 24, p. A-35 (1959 large landowner response to House questionnaire on land policies); FoF 25, p. A-36 (1959 testimony from Territorial Council of Hawaiian Civic Clubs, presumed precursor to Association of Hawaiian Civic Clubs, Amicus Curiae herein, and from Bishop Estate); FoF 32, p. A-41 (1961 testimony of Bishop Estate and Campbell Estates); FoF 37, p. A-45 (1963 testimony of Bishop and Campbell Estates and others); FoF 39-40, pp. A-45 - A-46 (1967 testimony by Bishop Estate, Council of Hawaiian Organizations, QLT and others on effect of initial Hawaii Land Reform Act subsequent to enactment but prior to effective date of July 1969, purpose of delay being to "allow the Legislature to receive additional input from the community on the Act"); FoF 47, pp. A-46 - A-54 (1967 committee reports regarding meetings between members of legislature, Bishop Estate and other large landowners, and Internal Revenue Service regarding tax aspects of Hawaii Land Reform Act); FoF 51, p. A-57 (1975 testimony of Bishop Estate and other large landowners); and FoF 53, p. 57 (1975 testimony of large landowner Kaneohe Ranch).

the search for a solution to Hawaii's residential leasehold problem. Initially, for example, Trustees and their beneficiaries played a pivotal role in the effort that blocked passage of the Hawaiian version of the Maryland Land Bill in 1963.[20] When the Act was finally passed in its first version in 1967, the legislature accommodated the lessors' prime concern with leasehold condemnation: the tax treatment of condemnation proceeds.[21] And even after the Act's

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[20] See Trustees' Brief, p. 5 n. 13, and How Land Reform Came To Hawaii, Honolulu Star-Bulletin & Advertiser, March 11, 1984, at A4, col.7 ("There was heavy opposition [to the 'Maryland land bill'] by the large landowners, by big trusts, and by Hawaiians who saw the bill as a threat to the Bishop Estate.")

[21] See Kamiloiki Valley Case, FoF 42, p. A-46 - A-47 (April 1967 House committee report on committee meeting with "representatives from the Bishop Estate, the Campbell Estate and the Kaneohe Ranch Co. . . . [and] the Internal Revenue Service to discuss the possible adverse income tax consequences to lessor-landowners upon the sale of fee simple

1967 passage, it remained basically unenforced by the state administration for nearly a decade, largely due no doubt to continued political and legal effort by Trustees and their predecessors to obstruct any legislative solution to the residential leasehold problem.[22]

In conclusion, Trustees no doubt remain opposed to the means chosen by the legislature as the optimum solution to Hawaii's

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[21] (cont'd) title to the lessees under various bills before the Legislature"), FoF 43, p. A-47 ("To accommodate the large landowners who did not want to be taxed as dealers in real estate on the proceeds of the lots sold under Senate Bill 1128, the Senate redrafted Bill 1128 in accordance with the indications of the Internal Revenue Service to provide for condemnation in bulk"), and FoF 44, at pp. A-51 - A-52 (1967 Senate committee report on accommodation of large landowners' tax concerns).

[22] See Honolulu Star-Bulletin & Advertiser, March 11, 1984, supra, n. 18, at A4, col. 8.

residential leasehold problem. But their continued resistance certainly cannot be equated with their preclusion from the legislative process that brought that solution about. The views of the Trustees and their beneficiaries were pressed upon the legislature and the state administration at every opportunity; their input was a key ingredient in reaching the informed, compromise solution the Act represents.

4. The Act will not preclude but will facilitate Trustees' continued efforts on behalf of Native Hawaiians.

Considering Trustees' heretofore near-total flexibility in the management of the trust affairs, Amici's and Trustees' fear of a legislative mandate that they reorder their manner of doing business is somewhat understandable. The Act, however, does not hinder

their ability to provide fully for the beneficiaries of the Bishop Estate. If anything, the indications are strongly to the contrary.

This is perhaps best evidenced by examining the current and potential sources of Bishop Estate's income. In this regard, Amicus QLT correctly points out the following:

> [M]ore that 97% of . . . [Bishop Estate's] lands has been classified by the State Land Use Commission as conservation or agriculture lands [not subject to the Act] . . . [and] produce little revenue . . . . [T]he . . . [Estate's] sizeable annual income is mostly generated from that small portion of its lands (less than 3%) classified as urban [, which include] the residential subdivisions at which the statute here in issue is aimed, as well as resort and other commercial properties.[23]

This is intended as evidence that the loss of residential leasehold revenues would wreak havoc upon the Trustees' ability adequately to finance the Kamehameha Schools.

But the facts are that while the Estate's residential leasehold lands comprise 2.42% of

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[23]QLT Brief, p. 5.

its total landholdings and produce 25.17% of its lease rent, its commercial lands, to which the Act does not apply, comprise but 0.17% of its total landholdings yet produce a whopping 64.10% of its lease rent income.[24] Moreover, from an investment standpoint gross returns from residential leasehold are notoriously low while the expenses associated with thousands of single-family residential leases are unacceptably high. The exodus from residential leasehold by Hawaii's other large landowners is as much evidence of these economic factors and of the vehicle the Act provides to get out of these investments without adverse tax consequences as of the governmental policy against residential leasehold.

Nor are the potential benefits to the Estate and similarly situated entities

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[24]Kamiloiki Valley Case, FoF 131 and 132 (Portlock Appendix, p. A-88)

confined strictly to the financial. As one Native Hawaii organization perceives:

> The Estate's net income supports the Kamehameha Schools, whose policy is to accept children of Hawaiian blood as students, but its residential properties are leased almost entirely to non-Hawaiians. To the extent tht lessees presently make the Estate's Native Hawaiian beneficiaries scapegoats for their inability to purchase and for extraordinary high housing costs, the Land Reform Act's requirement that residential property be sold to lessees may lessen resentment against the Estate, its trustees (whose compensation from the Estate exceeds $200,000 each) and its Native Hawaiian beneficiaries.[25]

In either event, it is too easily forgotten that the specific means chosen by the Legislature to redress the ills of the residential leasehold system, at the specific urging of residential lessors such as Trustees, was the exercise of the power of eminent domain. Trustees and other residential lessors are therefore guaranteed

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[25]Hou Brief, p. 35, n. 17.

payment of just compensation upon condemnation without adverse tax consequences.[26]

In fact, it appears extremely doubtful that Amici or large landowners such as the Trustees would favor any alternative solution to the residential leasehold problem accomplished by uncompensated regulation under the police power. Amici themselves suggest no such solution nor any other constructive approach to the dilemma. In fact, a review of all briefs on file with an eye toward problem-solving leaves the definite impression that the Act does provide the optimum solution. And if that solution ever

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[26] While Amici acknowledge as much, their concern is whether a condemnee will thereby receive "the full value of its land."[23] But Appellee Trustees voiced no specific concerns with the Act's valuation provisions on appeal, nor would acceptance of Amici QLT's views on what constitutes just compensation be consistent with any relevant federal and state precedent on the subject.

becomes no longer optional because of changed circumstances, there is absolutely no reason why Trustees or anyone else may not seek the legislature's alteration of the balance it has struck.

In conclusion, it is worth asking why, if the adverse economics of residential leasehold for the lessor and the serious social problems for the community are so clear, do Trustees resist the opportunity to sell under the Act's favorable tax treatment and instead attack its constitutionality? The answer may lie in Trustees' confidence that even if the Act is struck down they, unlike other large private landowners, may still obtain an Internal Revenue Service ruling allowing them to sell without adverse tax consequences because theirs is a charitable trust. They could then capitalize on lessees' strong desire to own the land under their homes by selling in what is really a

closed market situation at prices much higher than the fair market value that would be received by condemnation pursuant to the Act.[27] If the Act were struck down, it is,

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[27]A very strong indication that this is Trustees' policy is revealed in the Report of the Master on the Petition of the Trustees of the 97th Annual Report, Probate No. 2048 (Haw. Cir. Ct. December 6, 1983). As reported by the Master:

> Your Master inquired into the need for challenging the constitutionality of the Land Reform Act by the Trustees while they are still pursuing a policy of selling their residential lands. It was pointed out to your Master that the Act virtually eliminated the Trustees option of selling the Estate's residential lands at what would be considered a more favorable time to sell the lands in question; that the Trustees could probably obtain a sales price closer to the actual market value of the lands were they not forced to sell such lands. It should be noted that jury verdicts in valuation of real property generally tend to be the difference between the condemning authority's valuation and the land owner's valuation. The significance of selling their residential lands at a

of course, debatable whether (a) Trustees would sell at all, and (b) if they did sell, whether they would limit the "premium" to the $60 million discussed in the Master's Report,[28] and whether the result of their sales would be a financial killing at the expense of Hawaii's middle class or a social revolution that would irreparably damage Bishop Estate

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[27] (continued)

> higher price becomes obvious when one considers the possible sale of at least 60,000,000 square feet of land the Estate owns. Assuming arguendo the Estate could realize $1.00 a square foot more, the Estate could realize an additional $60,000,000. It was with this forethought that the Trustees decided to challenge the Land Reform Act. Such action does not, from the view point of the Estate seem to be unreasonable and the payment of legal fees in the amounts mentioned above may be of benefit to the Estate.

(emphasis added)

[28] See n. 27, supra.

and its beneficiaries, not to mention the State as a whole.[27]

B. Amici's Argument Is Not Relevant to the Questions Presented in These Appeals.

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[27]These are not idle fears. In 1976 and 1977, for example, dissatisfied tenants in Waiahole-Waikane on Oahu who did not qualify for fee purchase under the Act for various reasons, including the fact that their leases had actually expired, staged a rent strike against the single landowner, blocked highways, burned eviction notices, and refused to leave. See Tenants Won't Budge -- Next Move Is Up To . . .?, Honolulu Advertiser, January 4, 1977, at A1, col. 2, and The "War" of Waiahole, id. at A3, col. 2. The threat of violence was averted only when the State, exercising its general eminent domain powers, condemned the area: "The Hawaii Housing Authority yesterday paid $6 million in exchange for the deed to 600 acres in Waiahole Valley. Payment of the state housing fund to Elizabeth Marks means that the state is now officially the owner of the Windward Oahu valley where a year ago tenants were carrying on a bitter eviction fight. Earlier this year. Gov. George Ariyoshi announced that the state would buy the land. The decision averted possible confrontation between the tenants and the police over evictions." State Now Owns Waiahole Valley, Honolulu Advertiser, December 1, 1977, at A13, col. 1.

Built as it is upon this house of cards, Amici's argument that the Hawaii Land Reform Act should be struck down because it could possibly impact negatively on Native Hawaiians is at best suspect. But even if Amici's premises were not disputed, the conclusion Amici urges has no relevance to the issues before this Court.

This case is about two questions of law: (a) whether the power of eminent domain may be used in the fashion and under the circumstances set forth in the Hawaii Land Reform Act; and (b) whether the federal courts which are far removed from the problem and the solution should strike down the Act as facially unconstitutional when state judicial consideration is pending. Amici's attempt to expand those questions into a full-blown judicial debate on the existence and causes of the problems of Native Hawaiians should not be condoned.

CONCLUSION

The Hawaii Land Reform Act should be recognized for what it is: an excellent, workable compromise solution to a complex, multi-faceted problem which transgressed no constitutional boundaries and which, in its degree of public involvement and continued evolution, represented and continues to represent the best in our democratic tradition. The majority decision of the United States Court of Appeals for the Ninth Circuit should be reversed and the Act validated on its face.

Respectfully submitted,

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